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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

T.R.,
Plaintiff and Appellant,
v.
BAY AREA COMMUNITY SERVICES
et al.
Defendants and Respondents.

A153626

(Alameda County
Super. Ct. No. RG16841664)

Appellant T.R. filed a second amended complaint stating claims for negligence and negligent infliction of emotional distress against respondent Bay Area Community Services (Community Services), its board members Eric Dyce and Jamie Almanaza, and its former employee A.W. A claim for intentional infliction of emotional distress was asserted against A.W. only. In essence, appellant alleged her husband went to respondent Community Services for counseling, and that he had an affair with A.W., one of its employees. The trial court sustained a demurrer without leave to amend. We affirm.

I. BACKGROUND

The second amended complaint alleges that appellant's husband, J.R., was suffering from mental health issues and an addiction to drugs and was referred to Community Services for treatment. He began having a sexual relationship with A.W., an employee of Community Services. Appellant notified Community Services several times

about what was going on, and asked at least one employee if he knew A.W. was HIV¹ positive. Community Services did not provide appellant with answers about a disciplinary action against A.W. or the reasons she was ultimately terminated. Community Services and A.W. knew at all times that J.R. was married.

Defendants Community Services, Dyce and Almanaza filed a demurrer to the second amended complaint. It was sustained without leave to amend in an order issued after a hearing held on October 12, 2017. It cited *Smith v. Pust* (1993) 19 Cal.App.4th 263 (*Smith*), in which a therapist who had a sexual relationship with a patient was held not to owe a duty to her husband.

Defendant A.W. filed a separate demurrer to the second amended complaint, which was also heard and sustained without leave to amend on October 12, 2017. The court noted in its order that while J.R. might have a cause of action against A.W. for breach of her professional duties, she did not owe an independent duty of care to appellant.

Notice of entry of judgment was given and this appeal follows.

II. STANDARD OF REVIEW

Two standards are employed to review an order sustaining a demurrer without leave to amend. First, we review the complaint de novo to determine whether it alleged sufficient facts to state a cause of action, treating as true all material facts that have been properly pleaded (as well as matters subject to judicial notice), but disregarding contentions, deductions or conclusions of fact or law. (*Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 344 (*Heritage Oaks*); *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.) We then apply an abuse of discretion standard to determine whether there is a reasonable possibility the defects in the complaint could be cured by amendment. (*Heritage Oaks*, at p. 344.)

¹ Human immunodeficiency virus.

III. DISCUSSION

Appellant argues the trial court erred in sustaining the demurrers to the second amended complaint without leave to amend. She claims that as the family member of a patient and as a member of the community that the organizational defendant was supposed to serve, she was owed a legal duty. We disagree.

In *Smith, supra*, 19 Cal.App.4th 263, a husband filed a complaint against his wife's therapist after the therapist had a sexual encounter with the wife. The complaint alleged claims for negligence, bad faith and intentional and negligent infliction of emotional distress. (*Id.* at p. 268.) The court affirmed the trial court's summary judgment in favor of the therapist, finding that the husband's complaint was based on the "long-dead causes of action" for alienation of affection or criminal conversation.² (*Id.* at p. 269; Civ. Code, § 43.5, subds. (a) & (b).) As in *Smith*, appellant's causes of action, regardless of how they are framed, are for the now-defunct theories of alienation of affection and criminal conversation.

The *Smith* case noted that conduct which otherwise constitutes an abolished cause of action nonetheless may be actionable if it breaches a duty that is independent of the old cause of action. (*Smith, supra*, 19 Cal.App.4th at p. 269.) There are two requirements for establishing an independent duty of care: "(1) a genuine professional relationship must exist between the plaintiff and the defendant, and (2) the wrongful conduct must have a meaningful connection to the purpose of that professional relationship." (*Id.* at p. 270.) In the case before us, there was no professional relationship alleged between appellant and any defendant. As the court in *Smith* concluded: "[Defendant] had no more duty to [husband] than any other person not to cause [husband] emotional distress by having sex with [husband's] wife. No 'independent duty' exists to rescue the case from its essential nature as a suit for alienation of affection and criminal conversation." (*Smith, supra*, 19 Cal.App.4th at p. 273.) The fact Community Services put certain

² "Criminal conversation is sexual intercourse of an outsider with a husband or wife." (*Hirschy v. Coodley* (1953) 116 Cal.App.2d 102, 103.)

information on its website does not give rise to a duty to plaintiff as someone who was not a patient.

The *Smith* decision also addressed the husband's claims of negligent infliction of emotional distress and intentional infliction of emotional distress. (*Smith, supra*, 19 Cal.App.4th at pp. 273–275.) With respect to the former, husband was required to prove he was either a bystander (he was not, as he was not a percipient witness to any wrongful act) or a direct victim (he was not, because he did not have a patient-therapist relationship). (*Id.* at p. 273.) With respect to the latter, husband was required to prove the conduct was directed at him. (*Id.* at pp. 274–275.) It was not: no unusual facts were alleged and “[p]eople usually have sex for other reasons than to annoy third parties.” (*Id.* at p. 275.) We find the analysis in *Smith* to be persuasive and applicable to the facts alleged in appellant’s second amended complaint. (See also *Shin v. Kong* (2000) 80 Cal.App.4th 498, 501, 509 [husband was not owed duty by doctor who artificially inseminated wife, who consulted doctor alone and lied to husband about resulting child’s parentage]; compare *Hahn v. Mirza* (2007) 147 Cal.App.4th 740, 746, 751 [husband could maintain loss of consortium claim based on concealment of facts regarding wife’s mistaken breast cancer diagnosis but it was “clear” he could not state a cause of action based on negligence or fraudulent concealment].)

Appellant relies on *Richard H. v. Larry D.* (1988) 198 Cal.App.3d 591, 594, disapproved of in *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 448, fn. 8, 450 (*Richard H.*), in which a psychiatrist retained by a husband and wife for marriage counseling had sexual relations with the wife. The husband was permitted to maintain an action against the psychiatrist and the hospital that employed him. (*Richard H.* at p. 596.) To the extent the case remains good law, it is distinguishable from the one before us because appellant was not herself a patient of Community Services or A.W., and the mental health issues for which J.R. sought counseling had nothing to do with his marriage to appellant per se. (*Smith, supra*, 19 Cal.App.4th at p. 270, 272 [distinguishing *Richard H.* decision].)

We have also considered the effect of appellant's allegation that A.W. was HIV-positive when she engaged in sexual relations with J.R. Although there are some circumstances in which having sex while infected with HIV can give rise to a civil cause of action, it does not do so here. This is not an action based on the concealment of HIV, which was apparently known to appellant, or the failure to warn her of that condition. (Cf. *Reisner v. Regents of University of California* (1995) 31 Cal.App.4th 1195, 1198–1199 [medical facility that concealed from patient the HIV-positive status of blood used in transfusion had a duty to patient's boyfriend, who was later infected with virus].) This is also not a case in which a person infected with HIV is alleged to have fraudulently concealed his or her status to a sexual partner. (Cf. *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1182–1183, 1187.) Nor is it a case where a sexual partner brings an action for negligent transmission of a communicable disease. (*Id.* at p. 1188.) There is no basis for imposing a third-party duty on the facts alleged.

The trial court did not abuse its discretion in sustaining the demurrer without leave to amend. (*Heritage Oaks, supra*, 155 Cal.App.4th at p. 344.) Although appellant argues she should have been given a chance to file a third amended complaint, she has twice previously amended her pleading and she has not explained either in the trial court or on appeal how the second amended complaint could be amended to state a viable cause of action. (*Jensen v. The Home Depot, Inc.* (2018) 24 Cal.App.5th 92, 97.)

IV. DISPOSITION

The judgment is affirmed. In the interests of justice, the parties shall bear their own costs. (Cal. Rules of Court, rule 8.278(a)(5).)

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

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